Petition

81-851

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MISSOURI,

v.

EDMOND COX,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTIONS PRESENTED

I

Whether the procedures followed by St. Louis police officers in purchasing allegedly obscene materials, arresting the clerk who made the sale, confiscating the money used to make the purchase, and holding only $1.00 as evidence, constitutes an illegal seizure of materials presumptively protected by the First Amendment, in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 8 of the Missouri Constitution, and Section 542.281, RSMo. 1974.

II

Whether petitioner's rights to due process of law protected by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, were violated by failure of the State to offer any evidence that petitioner himself received pecuniary gain from the sale of poronographic materials.

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PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

Edmond Cox, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, Eastern District, entered in the above-entitled cause on June 2, 1981.

OPINION BELOW

This cause was decided by a panel of the Missouri Court of Appeals, Eastern District, on June 2, 1981, in an opinion which is reported at 619 S.W.2d 794. The opinion is reproduced as Appendix A hereto (App. A-1 to A-6).

On July 10, 1981, the Missouri Court of Appeals, Eastern District, denied petitioner's Motion for Rehearing or, in the

alternative, For Transfer to the Supreme Court of Missouri. The Court's order is reproduced as Appendix B hereto (App. B-1).

On September 8, 1981, the Missouri Supreme Court denied petitioner's Application for Transfer. The Court's order is reproduced as Appendix C hereto (App. C-1).

JURISDICTION

The judgment of the Missouri Court of Appeals, Eastern District, was entered on June 2, 1981. (See Appendix A.) A timely petition for rehearing or, in the alternative, for transfer to the Missouri Supreme Court was denied by the Missouri Court of Appeals on July 10, 1981 (See Appendix B). Thereafter, a timely Application for Transfer was filed in the Missouri Supreme Court and denied by the Court on September 8, 1981 (See Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments To The United States Constitution

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * * * * * *

Article IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * *

Article V

No person shall ... be deprived of life; liberty or property without due process of law.

* * * * * * * *

Article XIV

Section 1. ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * * *

Constitution Of Missouri

Article I

Section 8. Freedom of speech—evidence of truth in defamation actions—province of jury. That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.

* * * * * * * *

Section 10. Due process of law. That no person shall be deprived of life, liberty or property without due process of law.

* * * * * * * *

Missouri Statutes

542.281. Obscene matter, search warrant for—transcript of proceedings—hearing on obscenity—alteration of material after notice of hearing prohibited.—1. Any police officer, sheriff or deputy sheriff may make application for the issuance of a search warrant to search for and seize:

(1) Obscene matter being held or displayed for sale, exhibition, distribution, or circulation to the public, if such matter is of such a nature that the average person, applying contemporary community standards would find that the matter, taken as a whole, appeals to the prurient interest, if the matter depicts or describes, in a patently offensive way, sexual conduct specifically defined by Missouri law as obscene, and if the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) Property which has been used by the owner, or used with his consent, as a raw material or as an instument to publish or produce such obscene matter.

2. A warrant to search for obscene matter being held or displayed for sale, exhibition, distribution, or circulation or for property which has been used as a raw material or as an instrument to publish or produce such obscene matter may be issued by a judge of the circuit court in the county or judicial district in which the alleged matter or property is located. Except as provided in this section, the issuance of a warrant to search for and seize obscene matter shall be governed by the provisions of section 542.276.

3. A copy or photograph fo the allegedly obscene matter may be annexed to the application. The application and the warrant, if issued, shall designate precisely by title, or otherwise, each item or type of item to be searched for and seized. No warrant shall be issued to search for and seize any item or type of item unless the judge determines there is probable cause to believe that each item or type of item sought is obscene as defined by law, and is being held or displayed for sale, exhibition, distribution, or circulation to the public.

4. A transcript shall be made of all proceedings under this section and under subsections 3 and 4 of section 542.301.

5. If more than twenty items are to be seized, or if the item to be seized is a motion picture film being exhibited to the public, the judge shall hold an adversary hearing to determine whether such matter is obscene before issuing a warrant. Not less than twenty-four hours before such hearing, written notice of the date, time, place and nature of the hearing, including a description of the matter sought, shall be personally served upon the dealer, exhibiter, displayer or his agent. No warrant shall be issued without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition to the issuance. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings, willfully prevents the prompt resolution of the hearing, a decision shall be rendered no later than ten days from the date of the commencement of the hearing. The hearing shall determine whether the average person, applying contemporary community standards would find that the matter sought, taken as a whole, appeals to the prurient interest, whether the matter sought depicts or describes, in a patently offensive way, sexual conduct specifically defined as obscene by the laws of this state, and whether the matter sought, taken as a whole, lacks serious literary, artistic, political, or scientific value. Upon determination that there is probable cause to believe the matter sought is obscene, the

judge shall issue a warrant to search for and seize it. After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court.

* * * * * * *

§ 542.301. 4. (1) When allegedly obscene matter has been seized under a search warrant issued without a prior adversary hearing, or has been seized without a warrant, the officer, who executed the warrant or seized the matter without warrant, shall give notice of the fact of seizure to the prosecuting attorney of the county in which the matter was seized. Within three days of the seizure the prosecuting attorney shall file a written motion with the circuit court of the county or judicial district in which the seizure occurred praying for an order directing the forfeiture of the matter. Upon filing of the motion, the court shall set a date for a hearing. Written notice of date, time, place, and nature of the hearing shall be personally served upon the owner, dealer, exhibitor, displayer, or his agent. Such notice shall be served no less than five days before the hearing.

(2) If the evidence is clear and convincing that the matter is obscene as defined by law, and it was being held or displayed for sale, exhibition, distribution, or circulation to the public, the judge shall declare it to be obscene and forfeited to the state and order its destruction. However, no forfeiture shall be decalred without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition and without the judge having thoroughly examined each item. Except when the dealer, exhibitor, or displayer consents to a longer period, or by his actions or pleadings willfully prevents the prompt resolution of the hearing, judgment shall be rendered within fifteen days from the date of the seizure. If the matter is not found to be obscene, or is not found to have been held or displayed for sale, exhibition, distribution, or circulation to the public, or a judg-

ment is not entered within the time provided for, the matter shall be restored forthwith to the dealer, exhibitor, or displayer.

(3) If an appeal is taken by the dealer, exhibitor, or displayer from an adverse judgment, the case shall be assigned for hearing at the earliest practicable date and expedited in every way. Destruction of matter declared forfeited shall be postponed until the judgment has become final by exhaustion of appeal, or by expiration of the time for appeal, and until the matter is no longer needed as evidence in a criminal proceeding.

(4) A determination of obscenity shall not be admissible in any criminal proceeding against any person or corporation for sale or possession of obscene matter.

5. An appeal by any party shall be allowed from the judgment of the court as in other civil actions.

* * * * * * * *

573.030. promoting pornography in the second degree.—1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:

(1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or

(2) Produces, presents, directs or participates in any pornographic performance for pecuniary gain.

2. Promoting pornography in the second degree is a class A misdemeanor.

* * * * * * * *

573.040. Furnishing pornographic materials to minors.—1. A person commits the crime of furnishing pornographic material to minors if, knowing its content and character, he:

(1) Furnishes any material pornographic for minors, knowing that the person to whom it is furnished is a minor or acting in reckless disregard of the likelihood that such person is a minor; or

(2) Produces, presents, directs or participates in any performance pornographic for minors that is furnished to a minor knowing that any person viewing such performance is a minor or acting in reckless disregard of the likelihood that a minor is viewing the performance.

2. Furnishing pornographic material to minors is a class A misdemeanor.

* * * * * * * *

STATEMENT OF THE CASE

The State of Missouri, by an amended information, charged Edmond Cox, petitioner, with the promotion of pornography in the second degree, in violation of Section 573.030, RSMo. 1979. The material consisted of two magazines, "Seductive Lady" and "Kim", which were sold by Cox on November 24, 1979, to a St. Louis police officer.

Petitioner filed various pretrial motions including a motion to suppress evidence which raised the first issue to be addressed herein (See Appendix D hereto.) On April 14, 1980, a hearing was held and evidence adduced on petitioner's pretrial motions. The motions were taken under advisement, and the motion to suppress was denied in an order entered on April 21, 1980.[1]

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[1] The order required the State to return to petitioner the money used in the purchase that was not being held as evidence. (See Appendix E hereto.) Petitioner filed a written objection to that portion of the Court's ruling. (See Appendix F hereto.)

On August 18, 1980, this cause was tried before the Court sitting without a jury. Petitioner preserved his objections to the introduction into evidence of the two magazines (Tr. 4). The relevant facts in this cause are as follows: on November 29, 1979, Elishia Moore, a plainclothes police detective of the Vice Division of the Metropolitan Police Department of St. Louis, as part of an ongoing investigation into the operation of adult-type bookstores in the City of St. Louis, entered a business establishment located at 3724 North Union Street, St. Louis, Missouri, posing as a customer (Tr. 4). The officer selected two magazines off the store rack (Tr. 5), and after a short conversation with Edmond Cox, who was identified by the officer as the clerk, indicated to Mr. Cox that he desired to purchase the items. The items were rung up on the register, and the officer gave the petitioner the designated amount, with the petitioner returning to the officer the appropriate change (Tr. 8). At this point, the officer:

> ". . . identified myself as a police officer and showed him my department badge and asked him to give me the money back that I used to purchase the magazines with." (Tr. 8)

Detective Moore testified that the money in question was the property of the Metropolitan Police Department, and he was accountable for it (Tr. 6, 10-11). He stated that at the time he handed the money to Mr. Cox, it was his intention to place him under arrest and take the money back (Tr. 9). It was never Detective Moore's intention to purchase the magazines and leave with them (Tr. 9-10), or to allow the petitioner to keep the money (Tr. 10). One dollar of the money was held as "evidence" with the remainder being returned to the general fund of the department (Tr. 10-11). The officer had no warrant to search for or seize any item in the store (Tr. 9). Finally, the record reflects that this was the standard operating procedure for the Vice Division of the Metropolitan Police Department of the City of St. Louis (Tr. 9).

There was no evidence offered by the State to prove petitioner's relationship to the bookstore, i.e., whether he was a salaried employee, worked on a commission, or was merely a volunteer. At the close of the State's evidence, petitioner filed his motion for judgment of acquittal which was argued and overruled (Tr. 17-18). The motion for judgment of acquittal raised the second issue to be addressed herein. The Court found Edmond Cox guilty as charged and assessed a fine in the amount of One Hundred Dollars ($100.00) and costs of court (Tr. 22).

On June 2, 1981, the Missouri Court of Appeals, Eastern District, affirmed petitioner's conviction. Petitioner's timely filed petition for rehearing or, in the alternative, for transfer to the Missouri Supreme Court was denied by the Court of Appeals on July 10, 1981. The Missouri Supreme Court denied petitioner's Application for Transfer on September 8, 1981.

REASONS FOR GRANTING THE WRIT

I

Improper Seizure of Allegedly Obscene Material

The Vice Division of the St. Louis Police Department has instituted a procedure designed to obviate the necessity of obtaining a search warrant prior to seizing allegedly obscene materials from adult business establishments. The procedure is exceedingly simple. The officer goes into the establishment in plain clothes, purchases magazines or movies, arrests the clerk who made the sale, and then takes the money back, holding $1.00 as evidence. The Missouri Courts, in this case and in prior decisions, have given this procedure their approval by labeling the transaction a "sale" to the officers rather than a seizure by the officers. **State** v. **Perry**, 567 S.W.2d 380 (Mo. App. 1978); **State** v. **Flynn**, 519 S.W.2d 10 (Mo. 1975); **State** v. **Shouse**, 519 S.W.2d 13 (Mo. 1975); **State** v. **Richardson**, 506 S.W.2d 488 (Mo. App. 1974).

This innovative approach, which does away with the necessity of the independent magistrate who is to focus searchingly on the question of obscenity, has developed in the State which was the subject of **Marcus** v. **Search Warrant**, 367 U.S. 717 (1961). In 1974, in response to **Marcus** and other decisions of this Court, including **Miller** v. **California**, 413 U.S. 15 (1973), the Missouri Legislature enacted a separate and distinct statute dealing with the procedure to be followed in obtaining warrants to seize allegedly obscene materials. Section 542.281, RSMo. 1974, is replete with clearly enunciated provisions designed to insure that due process is strictly observed in the seizure of materials which may be protected by the First Amendment: a warrant is required to search for obscene matter, which only a circuit judge may issue (Subsection 2). The application and warrant must "designate precisely by title, or otherwise each item or type of item, to be searched for and seized" and the warrant cannot be issued "unless the judge determines there is probable

cause to believe that each item or type of item sought is obscene as defined by law" (Subsection 3). All proceedings under the statute must be transcribed (Subsection 4). If a film being shown to the public or items numbering more than twenty are to be seized the determination of obscenity, following the **Miller** standards, must be made by the judge in an adversary hearing before a warrant may issue (Subsection 5). When a seizure is made without a warrant, the prosecuting attorney is required within three days to file a forfeiture motion where a hearing is held to determine obscenity. Section 542.301(4), RSMo. 1974. By calling the transaction a "sale", that statutory safeguard is also circumvented.

Clearly the legislative intent was to codify very stringent requirements for obtaining warrants when materials presumptively protected by the First Amendment are involved. These strict procedures far exceed those of normal Fourth Amendment search requirements, and are undoubtedly a response to the warning of this Court in **Marcus** that "under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." 367 U.S. 717, 731.

The procedures sanctioned by the Missouri courts, contrary to Missouri statutory requirement, are a sham which were only devised to by-pass the constitutional requirement that the State apply to a neutral magistrate for a warrant prior to seizing materials which are presumptively protected by the First Amendment. The United States Supreme Court time and time again has recognized this requirement. In **Lo-Ji Sales, Inc.** v. **New York**, 442 U.S. 319 (1979), the Court stated in footnote 5, (l.c. 326):

> "But we have recognized special constraints upon searches and seizures of material arguably protected by the First Amendment, e.g., **Heller** v. **New York**, 413 U.S. 483

(1973); **Marcus** v. **Search Warrant**, 367 U.S. 717, 731-732 (1961); materials normally may not be seized on the basis of alleged obscenity without a warrant."

Detective Moore testified that the money used to "purchase" the materials was the property of the Metropolitan Police Department, and the officer was accountable for it (Tr. 6, 10-11). He stated that at the time he handed petitioner the money it was his intention to place petitioner under arrest and take the money back (Tr. 9). It was never his intention to purchase the magazines and leave with them (Tr. 9-10) or to allow the petitioner to keep the money (Tr. 10). One dollar ($1.00) of the money was held as "evidence" with the remainder being returned to the general fund of the department (Tr. 10-11). The officer had no warrant to search or seize any item in the store (Tr. 9). This is the standard operating procedure for the Vice Division of the Metropolitan Police Department of St. Louis (Tr. 9).

It is evident from the testimony herein that the officer entered the store with the manifest **intent** to depart after making an arrest with all of the money entrusted to him by the department as well as with items which he, in his sole and unfettered discretion, determined to be obscene. It is petitioner's contention that the above-described scheme constitutes an illegal, warrantless seizure of allegedly obscene materials.

To hold that no seizure occurred because the officer was only confiscating evidence of the crime is to legitimize a ruse. If that were so, why is only $1.00 held as evidence while the rest is returned to the general funds of the Vice Department? Should not the police have confiscated only $1,00? (See Appendix E and F).

Petitioner submits that there was no "sale" in the instant case. A broad body of well-developed law has evolved in Missouri to aid in the determination of whether the actions herein constituted a "sale".

Black's Law Dictionary, 4th Rev. Ed., defines a sale as a contract:

> ". . . whereby property is transferred from one person to another for consideration of value . . . an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself." p. 1503

In **State** v. **Davis**, 450 S.W.2d 168, 170 (Mo. 1970), the Court defined a sale as ". . . a contract to transfer property rights for money paid or promised to be paid." Furthermore, the Legislature of the State of Missouri, in passing the Uniform Commercial Code, has defined the term "Sale": A sale consists in "the passing of title from the seller to the buyer for a price". Section 400.2-106, RSMo. "Title to goods passes from the seller to the buyer in any manner and upon any conditions explicitly agreed on by the parties." Section 400.2-401, RSMo. Both the Court and the Legislature have determined that a sale takes place only when title to goods passes from the seller to the buyer.

The issue in this case thus becomes whether or not title to the items in question passed from the clerk to the police officer prior to the arrest. The courts of Missouri have long held that the time of passing of title to property under such conditions is a question of intention unless specifically provided for otherwise. The key is the **intent** of the parties. **Calcara** v. **United States**, 53 F.2d 767 (8th Cir. 1932); **Bowen** v. **Vaccante**, 208 S.W. 177 (Mo. App. 1919); **Consolidated Flour Mills Company** v. **Farmers Elevator of Hume**, 247 S.W. 480 (Mo. App. 1923); **Turner Looker Liquor Company** v. **Hindman**, 232 S.W. 1076 (Mo. App. 1921), aff'd. 240 S.W. 388; **Shearer Motor Company** v. **Burmeister**, 216 S.W.2d 955 (Mo. App. 1949). See also: 46 Am.Jur., **Sales**, Section 2; 42 Am. Jur., **Property**, Section 54.

Since the police officer's intent from the inception of his actions was to depart the store with all of his money, it is impossible for the title of the goods in question herein to have passed from the seller to the buyer. A transaction such as that before the Court may well appear to be a sale until the point at which the seller is arrested, and his consideration confiscated, but from the moment, the activity is revealed as a seizure.

Further, as the United States Supreme Court noted **Roaden** v. **Kentucky**, 413 U.S. 496 (1973), issues as to the reasonableness of seizures cannot be simply resolved by an examination of the procedures utilized by the police. The nature of the material involved and the setting must be considered as well. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 413 U.S. 496, 501. The Court held the warrantless seizure unreasonable under the Fourth and Fourteenth Amendment standards due to its effect as prior restraint of the First Amendment right of expression which "whether by books or films, calls for a higher hurdle in the evaluation of reasonableness". 413 U.S. 496, 504. Freedom of expression was a necessary consideration because of the setting, the commerical movie theater presumptively clothed with First Amendment protection.

The effect of the procedures followed by the arresting officer here was to circumvent the statutory requirement that allegedly obscene matter be seized only pursuant to a warrant properly issued by a judge of the circuit court.

The police procedures herein fall short of a sale. This sham sale, if conducted by a private citizen, would constitute theft. The State may not be heard to argue that the monies confiscated are necessary for prosecution of the seller, and thus seek to legitimize their activity, because only one dollar is seized, marked and held as evidence. The remainder is returned to the officer's superiors or retained by the officer. Were it, in fact, a

sale, the police department would own the magazine or film purchased, and the sales clerk would be entitled to the money. It is submitted that this false sale scheme is utilized by officers to seize purportedly obscene materials without seeking a search warrant as the United States Supreme Court has mandated and as required by the statutes of the State of Missouri.

II

Pecuniary Gain

Petitioner was convicted under the provisions of Section 573.030, RSMo. 1979, promoting pornography in the second degree. This Missouri statute was modeled on New York Penal Section 235.05, which reads in part:

> "A person is guilty of obscenity in the second degree when knowing its content and character, he:
>
> 1. Promotes, or possesses with intent to promote, any obscene material."

The Missouri statute goes further than that of New York. Missouri added a **caveat:** no person would be guilty of promoting pornography in the second degree unless he had done so for "pecuniary gain". Petitioner submits it was the intention of the legislature in including that limiting language to narrow the scope ofliability under the statute to those persons gaining some financial benefit from the sale, and it is this critical element which the State has completely failed to prove in this case.

While the phrases pecuniary condition, pecuniary interest and pecuniary loss are defined in Missouri case law, the term "pecuniary gain" is not. However, the meaning of the term is not hard to divine, since "pecuniary" is defined as "monetary; relating to money; financial; consisting of money or that which can be valued in money", **Black's Law Dictionary,** 4th Rev. Ed., p. 1288. Likewise, the term "gain" is defined as "profits; winnings; increments of value". **Black's Law Dictionary,** *supra,*

p. 807. Nor are "pecuniary" and "gain" legal words of art, since their "legal" meanings are substantially the same as their normal, everyday meanings. **See: The New Webster Encyclopedic Dictionary of the English Language**, pp. 355 and 611. It is clear, therefore, that a reasonable definition of the term "pecuniary gain" in the instant case would be "financial gains or profits". Therefore, the statute requires proof of financial gain or profits to the person charged with the violation. Petitioner asserts that the State wholly failed to introduce any evidence from which the Court below could determine that petitioner promoted pornographic materials for "pecuniary gain". There was no evidence adduced at trial that petitioner made any financial gain or profit from the transaction for which he is charged. (The characterization of that transaction as a "sale" is specifically objected to and addressed in petitioner's arguments, *supra.*) In fact, there is no **direct** evidence that petitioner was employed by or received **any** compensation from the owner of the bookstore at all.

There is evidence that petitioner was seen behind a counter (Tr. 15), and that when the officer consummated his alleged purchase, petitioner took the money and made change (Tr. 8-11, 15, 16). Further, there was a short conversation concerning the intended purchase (Tr. 12) and the officer's **assumption** that petitioner was the clerk (Tr. 7). At best, this evidence constitutes circumstantial evidence from which one could infer that petitioner was the clerk. Petitioner would contend that the evidence adduced at trial is not such that it excludes **all** reasonable hypotheses other than that petitioner was the clerk.

Even if one assumes **arguendo** that petitioner was the clerk, based upon the circumstantial evidence adduced at trial, that does **not** resolve the question of whether a clerk necessarily receives a "pecuniary gain" from each sale. To do so would constitute drawing inferences from the inference drawn from the circumstantial evidence presented. Such reliance upon inferences drawn from inferences is prohibited by the recognized

laws of evidence. **See: Goodman** v. **Simonds,** 61 U.S. 343 (1857); **Sexton** v. **Metropolitan St. Ry. Co.,** 149 S.W. 21 (Mo. 1912); **Farnham** v. **Boone,** 431 S.W.2d 154 (Mo. 1968); **Antweiler** v. **Prudential Ins. Co. of America,** 290 S.W.2d 652 (Mo. App. 1956).

Further, even if it is assumed that the clerk receives a salary from the enterprise for which he sold the book it would be insufficient to bring him under the "for pecuniary gain" standard. If that were the intent of the legislature, there would have been no need to add the additional language to the New York model. New York and other states with similar legislation have interpreted the word "promote" to include those who sell pornographic material. If the legislature had intended the Missouri statute to have the same scope of liability as the New York statute, they would not have added language to the New York statute to narrow its focus. To be liable under Section 573.030, RSMo., a person must be more than a mere employee of the establishment which possesses and/or promotes the material; there must be some direct connection between the promotion or sale of the object and the defendant's personal enrichment. Mere receipt of money on another's behalf is not enough.

The exemption from criminal liability of mere employees of establishments such as bookstores is made all the more clear by the absence of limiting language in Section 573.040, RSMo. Clerks and other personnel **are** to be held criminally liable for furnishing pornographic material to minors, whether they profited from the transaction or not. If the scope of criminal liability of Section 573.030 was to have been the same as Section 573.040, the limiting language of Section 573.030 would not have been adopted.

A clerk in a bookstore performs many duties for his employer for which he may receive a salary; one of those duties is to take money for items sold. It is true that the money the employee ultimately receives may, in large part, be derived from sale pro-

ceeds. But, it cannot be said that there is a connection between the money netted from the sale of any particular item and the employee's receipt of money unless the clerk is paid on a commission basis, or otherwise has a financial interest in the business. If the employee is to be held liable because his salary which derived from sale proceeds is said to constitute "pecuniary gain", then the same criminal liability should be imposed on anyone who performs a service for the bookstore in furtherance of its operation and receives money out of sale proceeds: the landlord who rents the building, the janitor who cleans up, the electrician who fixes the light, etc.

There must be a line drawn somewhere and the Missouri legislature attempted to do just that. A person is not liable under Section 573.030 for promoting obscene material for "pecuniary gain" unless he has a financial interest in the business, receives a commission for his sales, or there is otherwise a direct link between the possession/promotion of the item and his personal enrichment. It is axiomatic that the law requires criminal statutes to be liberally construed in favor of the defendant and strictly against the state. **State** v. **Treadway**, 558 S.W.2d 646 (Mo. banc, 1977).

Because the record in this case wholly fails to establish beyond a reasonable doubt that petitioner received any "pecuniary gain" from the aforesaid transaction, and without such proof, the State has failed to prove an essential element of the charge, petitioner's Motion for Judgment of Acquittal should have been granted. Failure to present sufficient evidence deprived petitioner of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

LEONARD J. FRANKEL
WOLFF & FRANKEL
8019 Forsyth Boulevard
St. Louis, Missouri 63105
(314) 725-8019

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Division Three

No. 43347

State of Missouri,
Respondent,

vs.

Edmond Cox,
Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Honorable Arthur F. Miorelli

Opinion Filed:

June 2, 1981

Defendant was convicted by the Circuit Court of the City of St. Louis, sitting without a jury, of the offense of promoting pornography in the second degree, § 573.030, RSMo 1978, and assessed a fine in the amount of $100. Defendant appeals. We affirm.

On November 29, 1979, Elishia Moore, a plainclothes police detective of the Vice Division of the Metropolitan Police Department of St. Louis, as part of an ongoing investigation into the operation of adult-type bookstores in the City of St. Louis, entered a business establishment, known as the California Book Store, located at 3724 N. Union Street, St. Louis, Missouri, posing as a customer. The officer selected two magazines off the rack, one entitled "Kim" and the other entitled "Seductive Lady." The officer took the two magazines to the defendant who was standing behind the counter and who was

identified by the officer as the store clerk. The magazines were wrapped in clear cellophane, and the Officer asked defendant if the material on the inside of the magazines was generally the same as the material on the cover. The defendant said that it was. The officer then indicated to defendant that he desired to purchase the items. They were rung up on the register and the officer gave the defendant the designated amount of purchase money. The officer then revealed his true identity and asked that his money be returned. The defendant returned the money. The officer testified that the money used was the property of the Metropolitan Police Department and that he was accountable for it. The officer stated that at the time he handed the money to the defendant, it was his intention to place defendant under arrest and take back the money. In addition to the testimony of the officer, the state's evidence consisted of the two magazines. Defendant contends that the court erred in declaring the magazines to be obscene under the rules stated in Miller v. California, 413 U.S. 15 (1973).

Although the issue presented here has been the subject of substantial debate among judges, legal scholars and academicians over the years (see majority, concurring and dissenting opinions in Miller v. California, *supra,* and McNary v. Carlton, 527 S.W.2d 343 (Mo.banc 1975), the fact remains that a majority of the United States Supreme Court in **Miller** recognized "that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material," *Id.* at 18, and adopted guidelines in response to this recognition. In **McNary**, a majority of the Missouri Supreme Court adopted the guidelines established in **Miller** to enable Missouri to regulate the dissemination of obscene material if these guidelines are met.

In **Miller**, the court confined the permissible scope of a state's regulation to works which depict or describe sexual conduct. The conduct must be specifically defined by the applicable state law, and the state offense must be limited to works which meet the court's guidelines. *Id.* at 24.

The court then set out the basic guidelines for the trier of fact:

> (a) whether the 'average person applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest, (citations omitted);
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24.

The court gave a few examples of what a state statute could define for regulation under part (b), *supra*:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 25.

The guidelines established by **Miller** have been essentially incorporated by the Missouri General Assembly into Subsections (1) and (10) of § 573.010, RSMo 1978, which state:

> (1) 'Pornographic', any material or performance is 'pornographic' if, considered as a whole, applying contemporary community standards:
>
> (a) Its predominant appeal is to prurient interest in sex; and
>
> (b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

. . . .

(10) 'Sexual conduct' means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification; . . . .

These subsections define the terms contained in the statute under which defendant was convicted.

In the case before us, the defendant consented to a trial of his case by the court sitting without a jury. Therefore, the court sat as a trier of fact. The court found the materal to be pornographic under Missouri law. The photographs in each of these magazines are close-ups of sexual intercourse in various positions, fellatio, cunnilingus, ejaculation, etc. We find no merit in defendant's contention that the court erred in determining that the magazines were pornographic.

Defendant next contends that the state failed to introduce any evidence to establish that the promotion of pornographic materials was done for pecuniary gain as required by § 573.030, RSMo 1978. Defendant argues that the statute requires evidence of personal financial gain or profit. Section 573.030, RSMo 1978, in its applicable part, reads:

1. A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he:

(1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; . . . .

There is no Missouri case law interpreting the phrase "pecuniary gain." However, in its Comment to § 573.030, RSMo 1978, the legislature has indicated that the emphasis in this area should be on the commercial distribution of pornography, including private clubs and areas involving direct consideration such as sales of food and liquor. Comment to 1973 Proposed Code.

This legislative intent is further confirmed by the Comment to § 573.040, RSMo 1978, which prohibits the furnishment of pornographic materials to minors, and omits the requirement of pornographic materials to minors, and omits the requirement of "pecuniary gain." The Comment states that to protect children from exposure to materials or performances, "[t]he purpose is broader than merely combating commercial exploitation of obscenity." Comment to 1973 Proposed Code.

It is clear that the legislature intended that § 573.030, RSMo 1978, apply to persons promoting the sale of pornography regardless of their personal gain or profit in each sale. It is equally clear that the case before us comes within the scope of this statute. The arresting officer testified that he gave money to the defendant for the purchase of two magazines and that the defendant put the money in the cash register, returning the change.

Defendant's third point is also without merit. He contends that the court erred in failing to sustain his motion to suppress as evidence the two magazines because the procedure followed by the officer did not constitute a valid purchase. Therefore, it was a seizure of presumptively protected First Amendment materials without a warrant in contravention of the First, Fourth and Fourteenth Amendments of the United States Constitution.

Defendant admits that the facts relating to the purchase in this case are almost identical to those in State v. Perry, 567 S.W.2d 380 (Mo.App. 1978). Judge McMillian, speaking for

our court, held that a valid sale had taken place. Defendant asks that we reexamine our holding in **Perry**. We have done so and find that Judge McMillian's logic is still sound.

We have also examined defendant's final point in which he contends that the court should have issued a summons rather than a warrant for his arrest. He relies on Rule 21.03 which states:

> Upon the filing of an information or the return of an indictment charging the commission of a misdemeanor a summons shall be issued unless there is reasonable grounds for the court to believe that the defendant will not appear upon the summons in which event a warrant for the arrest of the defendant shall be issued.

We find nothing in the record which would entitle the defendant to any relief upon this point.

The judgment of the trial court is hereby affirmed.

/s/ James R. Reinhard, Judge

/s/ Robert E. Crist, Presiding Judge, /s/ Concurs

/s/ Robert O. Snyder, Judge, /s/ concurs.

APPENDIX B

TO: Attorneys of Record

FROM: Ronald N. Bellamy, Clerk
Missouri Court of Appeals
Eastern District

RE: Motions for Rehearing and/or Transfer (Rulings)

DATE: July 10, 1981

The following motions for rehearing have been **DENIED** as of July 10, 1981:

1. No. 42479 Sandra Jean Dorris v. Zayre Corporation
2. No. 42738 Sylvester Mitchell v. Director of Revenue

The following motions for rehearing and/or transfer to the Missouri Supreme Court have all been **DENIED** as of this date, July 10, 1981:

* * *

24. No. 43347 State of Missouri v. Edmond Cox

* * *

APPENDIX C

No. 63264

IN THE SUPREME COURT OF MISSOURI

ED #43347

September Session 1981

State of Missouri,
Respondent,

v.

Edmond Cox,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS E. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1981, and on the 8th day of September 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 8th day of September 1981.

/s/ Thomas Simon, Clerk

/s/ Norma Jean Creach, D. C.

APPENDIX D

STATE OF MISSOURI }
SS
CITY OF ST. LOUIS }

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 809-01650

Division No. 29

State of Missouri
Plaintiff

v.

Edmond Cox,
Defendant

Motion To Suppress Evidence
(Filed March 19, 1980)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant in the above styled and numbered cause, by and through his attorney of record, Leonard Frankel, and moves this Honorable Court to suppress the following evidence:

1. All tangible evidence seized on or about November 29, 1979 at the business establishment located at: 3724 North Union, St. Louis, MO

2. All photographs taken by law enforcement officers of the items and premises described in paragraph 1.

3. All statements made and actions done by the Defendant if any, at the time of and subsequent to his apprehension by law enforcement officers.

4. Testimony of law enforcement officers, their agents and all other persons working in connection with such officers and agents, including all persons upon the premises at the time of the search, as to the alleged finding of the matter set out in paragraph one (1).

5. In support of this motion the Defendant would show the court that:

a. The arrest and apprehension of the Defendant was made without a warrant and without probable cause.

b. All statements made by the Defendant, if any, at the time of and subsequent to the arrest and apprehension of the Defendant were the product of an illegal search and illegal arrest. **Mapp.** v. **Ohio,** 367 U.S. 643 (1961); **Wong Sun** v. **U.S.** 371 U.S. 471 (1963).

c. The search and seizure of the foregoing matters were made without probable cause and without a search warrant and without exigent circumstances. **Coolidge** v. **New Hampshire,** 403 U.S. 443 (1971); **Roaden** v. **Kentucky,** 413 U.S. 496 (1973).

d. All matters seized by law enforcement officers were obtained illegally, in violation of the following provisions of the Constitutions and statutes of the State of Missouri and the United States:

(1) The prohibition against unreasonable searches and seizures, as guaranteed by Article I, Section 15 of the Constitution of the State of Missouri and by the Fourth and Fourteenth Amendments to the Constitution of the United States.

(2) The prohibition against defendant being compelled to be a witness and to testify against himself, as guaranteed by Article I, Section 19, of the Constittion of the State of Missouri and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(3) The prohibition against depriving any person, including defendant, of liberty or property without due process of law, as guaranteed by Article I, Section 10 of the Constitution of the State of Missouri and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(4) The prohibition against depriving any person, including defendant, of his natural right to liberty, the pursuit of happiness, and the enjoyment of the gains of his own industry, of equal rights and opportunity under the law, and of the equal protection of the law, as guaranteed by Article I, Section 2 of the Constitution of the United States.

(5) The prohibition against laws abridging the freedom of speech or the press, as guaranteed by the First Amendment to the Constitution of the United States.

(6) The requirements for obtaining a search warrant to seize allegedly obscene materials as provided for in Section 542.281, V.A.M.S.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that a date for a hearing on this motion be set, and after a hearing hereon, those matters set forth, in the foregoing numbered paragraphs be ordered suppressed at the trial of this cause.

Respectfully submitted,

By: /s/ R. K. Weaver
Leonard J. Frankel
WOLFF, FRANKEL
Attorneys for Defendant
8019 Forsyth
Clayton, Missouri 63105
725-8019

Copy of the foregoing Motion delivered to:

The Office of the Circuit Att. for the City of St. Louis, 1320 Market Street, Rm 330, St. Louis, MO 63103 this 19th day of March, 1980.

APPENDIX E

IN THE CIRCUIT COURT CITY OF ST. LOUIS

State of Missouri

v.

Edmond Cox

No. 809-01650 Room 29 4-21 1980

MEMORANDUM FOR CLERK

Order

(Filed April 21, 1980)

Motions taken up and argued 4-14-80 as follows:

1. Motion to Dismiss.

2. Motion to Suppress.

3. Motion to Consolidate.

4. Motion for return of material.

The aforesaid Motions were heard and taken under advisement.

1. Court now finds order for warrant to be in order on its face and hereby admits Defendant's Motion to Dismiss.

2. Court finds a bona fide sale to have occurred and orders that sum of money not specifically held in evidence to be returned forthwith to Defendant through his attorney: wherefore Court denies Motion to Suppress.

3. Motion to Consolidate so sustained. Court notes amended information filed 4-15-80 which is in one count only.

4. Court denies Motion for return of seized material.

So Ordered:
Thomas C. Grady, Judge

Cause Re-Set on Docket 5-19-80

APPENDIX F

STATE OF MISSOURI }
SS
CITY OF ST. LOUIS }

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 809-01650

Division No. 29

State of Missouri,
Plaintiff,

v.

Edmond Cox,
Defendant.

Defendant's Objection To The Trial Court's Pre-Trial Order

(Filed May 7, 1980)

Comes now the Defendant in the above-styled and numbered cause and specifically objects to that portion of this Court's pre-trial Order of April 21, 1981, which purports to require the State to "refund" a sum of money paid to Defendant, and as grounds therefor would show the Court that:

1. Said Order was in response to Defendant's previously filed Motion to Suppress Evidence. Said Order attempts to grant "relief" which was not requested by any party hereto.

2. Defendant specifically states that the money in question is **not** his and that he has no legal right thereto; and

3. If said money is proferred to Defendant by the State, Defendant will refuse to accept same.

4. The effect of the Court's Order is to create a "sale" where in fact no such sale occurred.

BY /s/ R. K. Weaver
Leonard J. Frankel
(MBE #19127)
Attorneys for Defendant
8019 Forsyth
Clayton, MO 63105
725-8019

Copy hereof mailed this 6th
day of May, 1980
to: Circuit Attorney's Office,
1320 Market Street, St. Louis,
MO, 63103.

R. K. Weaver

Opposition

81-851

No.

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MISSOURI,

v.

EDMOND COX,

Petitioner.

On Petition for a Writ of Certiorari to
The Missouri Court of Appeals,
Eastern District

BRIEF FOR THE STATE OF MISSOURI IN OPPOSITION

JOSEPH L. BAUER, JR.
MARY PATRICIA SCHROEDER
Assistant Circuit Attorneys
Municipal Courts Building Room 330
1320 Market Street
St. Louis, Missouri 63103
(314) 622-4941
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

I

Whether the procedures followed by St. Louis police officers in purchasing obscene materials, arresting the clerk who made the sale, confiscating the money used to make the purchase, and holding $1.00 of the money paid to the clerk for said purchase, constitutes a sale of said obscene materials, and not a seizure of said materials.

II

Whether evidence that petitioner was behind the sales counter, engaged in a conversation concerning the contents of obscene materials, accepted money for said obscene materials, packaged said obscene materials and delivered said obscene materials in packaged form to St. Louis police officers constituted sufficient evidence to sustain a conviction for violation of Missouri statute section 573.030.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MISSOURI,

v.

EDMOND COX,

Petitioner.

On Petition for a Writ of Certiorari to
The Missouri Court of Appeals,
Eastern District

BRIEF FOR THE STATE OF MISSOURI IN OPPOSITION

OPINION BELOW

The respondent hereby approves and adopts the Opinion Below as submitted by petitioner.

JURISDICTION

The respondent hereby approves and adopts the statement of petitioner under jurisdiction insofar as the statement of the history of this case is concerned, however, feels that the jurisdiction of this court, if invoked at all, should be invoked pursuant to 28 U.S.C. Section 1257(3) rather than 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The respondent hereby approves and adopts Missouri statutes cited by petitioner, Sections 542.281 RSMo. 1974 and 573.030 RSMo. 1979 and also cites the following Missouri statute: Section 573.010, RSMo. 1979.

MISSOURI STATUTES

573.010. Chapter definitions

As used in this chapter

(1) "Pornographic" any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults;

(2) "Material" means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statute or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects;

(3) "Performance" means any play, motion picture film, dance or exhibition performed before an audience;

(4) "Promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same;

(5) "Furnish" means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide;

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale;

(7) "Minor" means any person under the age of eighteen;

(8) "Pornographic for minors", any material or performance is "pornographic for minors" if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) It lacks serious literary, artistic, political, or scientific value for minors;

(9) "Nudity" means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering;

(10) "Sexual conduct" means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a peron's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

(11) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

(12) "Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification;

(13) "Explicit sexual material" means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation or unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided, however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition;

(14) "Displays publicly" means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others.

STATEMENT OF THE CASE

The State of Missouri, by an amended information, charged Edmond Cox, petitioner, with the promotion of pornography in the second degree, in violation of Section 573.030, RSMo. 1979. The material consisted of two magazines, "Seductive Lady" and "Kim", which were sold by Cox on November 24, 1979, to a St. Louis police officer.

Petitioner filed various pretrial motions including a motion to suppress evidence. On April 14, 1980, a hearing was held and evidence adduced on petitioner's pretrial motions. The motions were taken under advisement, and the motion to suppress was denied in an order entered on April 21, 1980.

On August 18, 1980, this cause was tried before the Court sitting without a jury. Petitioner preserved his objections to the introduction into evidence of the two magazines (Tr. 4). The relevant facts in this cause are as follows: on November 29, 1979, Elishia Moore, a plainclothes police detective of the Vice Division of the Metropolitan Police Department of St. Louis, as part of an ongoing investigation into the operation of adult-type bookstores in the City of St. Louis, entered a business establishment located at 3724 North Union Street, St. Louis, Missouri, posing as a customer (Tr. 4). The officer selected two magazines off the store rack which were wrapped in plastic (Tr. 5), and after a short conversation with Edmond Cox, who was identified by the officer as the clerk, indicated to Mr. Cox that he desired to purchase the items. The petitioner, in answer to a question by Detective Moore, indicated that the pictures on the inside of the magazine were similar to those on the outside covers (Tr. 12). The items were rung up on the register, and the officer gave the petitioner the designated amount, with the petitioner returning to the officer the appropriate change (Tr. 8). At this point, the officer:

> "... identified myself as a police officer and showed him my department badge and asked him to give me the money back that I used to purchase the magazines with." (Tr. 8).

Detective Moore testified that the money in question was the property of the Metropolitan Police Department, and he was accountable for it (Tr. 6, 10-11). He stated that at the time he handed the money to Mr. Cox, it was his intention to place him under arrest and take the money back. (Tr. 9). One dollar of the money was held as evidence.

At the close of the State's evidence, petitioner filed his motion for judgment of acquittal which was argued and overruled (Tr. 17-18). The Court found Edmond Cox guilty as charged and assessed a fine in the amount of One Hundred Dollars ($100.00) and costs of court (Tr. 22).

On June 2, 1981, the Missouri Court of Appeals, Eastern District, affirmed petitioner's conviction. Petitioner's timely filed petition for rehearing or, in the alternative, for transfer to the Missouri Supreme Court was denied by the Court of Appeals on July 10, 1981. The Missouri Supreme Court denied petitioner's Application for Transfer on September 8, 1981.

REASONS FOR DENYING THE WRIT

I.

Proper Seizure of Obscene Material

Petitioner argues that the procedure used by the police officer was not a sale and therefore was in violation of the Missouri Statute §542.281 RSMo. 1974 and applicable Supreme Court decisions. Petitioner contends that since this procedure was not a sale it resulted in the illegal seizure of the magazines.

This point was raised in *State* v. *Flynn*, 519 S.W.2d 10 (Mo. 1975) and the Missouri Supreme Court ruled that there was no seizure since the police officer purchased the magazine. The fact that the money was seized did not affect the sale since the money is evidence of the sale and seized for that purpose. The factual situation in *Flynn, supra,* is similar if not identical to that in the instant case.

Petitioner states that pursuant to *Marcus* v. *Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708 (1961) and *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d. 419 (1973) allegedly obscene materials can only be seized by the execution of a search warrant. The applicable Missouri statute is §542.281. A reading of this statute makes it clear that this statute provides for the seizure of a quantity of materials. This statute was enacted in response to the *Marcus* case and is designed to meet due process requirements.

The statute provides for notice to be given to the owner and an adversary hearing to be held within a set period of time. It is clear that this statute does not relate to any criminal proceedings; its purpose is the destruction of all copies of material found to be obscene. The statute specifically states that any determination of obscenity at the hearing is not admissable in a criminal proceeding.

The statute under which Petitioner was charged and convicted makes the promotion of obscene material a crime. In its applicable parts it states:

> "A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he: (1) promotes or possesses with the purpose to promote any pornographic material for pecuniary gain ..."

As outlined by the *Miller* decision the terms are defined. Promote is defined in section §573.010(4) RSMo. 1979 as:

> "... to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same";

The definition of pornographic follows the test as outlined in *Miller*. This statute also defines sexual conduct and sexual excitement.

The evidence elicited at trial was that the police officer entered the bookstore and selected two magazines from a rack. The magazines were individually wrapped in plastic. The officer stated that the covers of the magazines were clearly visible. After engaging in a conversation with the Petitioner concerning the magazines, the officer gave him money. The Petitioner took the money, made change, and gave the change and magazines to the officer.

It is clear that the activity sought to be prohibited by §573.030 RSMo. 1979 is the sale of pornographic material. The only evidence seized by the officer is the money used as proof of the sale. Petitioner argues that the intent of the police officer should be determinative of whether or not a sale occurred, however, since the Petitioner is charged with a criminal violation only his intent is to be considered. It is clear from the evidence that Petitioner intended to sell the magazines, knowing their contents,

and, therefore, was in violation of §573.030 RSMo. 1979. The procedure followed was the only way to prove that a sale had occured. Since there was a sale of said magazines by Petitioner, there was no seizure, and, therefore, §542.281 RSMo. 1974 did not apply.

II.

Pecuniary Gain

Petitioner argues that the State failed to meet its burden of proof because an essential element of the crime, to-wit: pecuniary gain, was not proven. Petitioner contends that this element is beyond proof unless there is evidence of a financial interest in the business, commissions or other direct link showing personal enrichment. Respondent respectfully asserts that this is a misinterpretation of the law.

Petitoner correctly states that §573.030 RSMo. 1979 is patterned after a New York statute. That statute does not include pecuniary gain as an element. The Missouri statute reads in its applicable part:

> "A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he: (1) Promotes or possesses with the purpose to promote any pornographic material for pecuniary gain..."

The concept of pecuniary gain is based on a Michigan statute. In the Comment to the proposed statute the Missouri Legislature added pecuniary gain to place the emphasis on the commercial distribution of pornographic material. The purpose was to make the wording broad enough to cover private clubs and the sale of liquor, food, etc. It can therefore be concluded that the Missouri Legislature did not intend to require proof of the personal enrichment of the defendant, but that the por-

nographic material was sold and a fee exacted, directly or indirectly. In the case at bar it is clear that appellant was offering pornographic material for sale.

The petitioner argues that since there is no direct proof of pecuniary gain to the defendant the motion for acquittal should have been sustained. He argues that acting as a clerk is not proof of profit or gain to the Petitioner. Further, that a mere employee should not be liable under this section. This argument is extended to the absurd stating that unless a direct link is required between the profit from the sale of the material and the employee, the landlord, janitor, electrician, etc. could also be liable.

Respondent submits that the statute does not cover a mere employee unless that employee has knowledge of the contents of the material and it is offered for sale for a fee. It is clear from the record that the appellant was a clerk for the California Bookstore (Tr. 15). The Bookstore contained various adult books and films (Tr. 4). The magazines in the store were displayed in clear plastic wrap (Tr. 7). The appellant engaged in a conversation with the police officer that clearly shows he had knowledge of the contents of the selected magazines (Tr. 12). The magazines were offered for sale and money was exchanged (Tr. 15). It is clear that the court correctly overruled the petitioner's motion. See also *State* v. *Edmond Cox,* 619 S.W. 2d. 794 (Mo. App. 1981) where the Missouri Court of Appeals, Eastern District, construed the applicable Missouri statutes and factual circumstances here.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for Certiorari should be denied.

Respectfully submitted,

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